



FEDERAL TRADE COMMISSION

[File No. 191 0068 / Docket No. C-4691]

Petition of Respondent DTE Energy Company to Reopen and Modify Decision and Order

AGENCY: Federal Trade Commission.

ACTION: Announcement of Petition; Request for Comment.

SUMMARY: DTE Energy Company (“DTE” or “the company”) has requested that the Federal Trade Commission (“FTC” or “Commission”) reopen and modify the Commission’s Decision and Order entered on November 21, 2019 (the “Order”), concerning the purchase of a natural gas pipeline and related assets. DTE requests that the Commission relieve the company of all continuing obligations under the Order because DTE has exited the relevant market addressed by the Order and its successor remains under the Order. Publication of the petition from DTE is not intended to affect the legal status of the petition or its final disposition.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY**

INFORMATION section below. Please write: “DTE Petition to Reopen and Modify; Docket No. C-4691” on your comment, and file your comment online at

www.regulations.gov by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address:

Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400

7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Aylin M. Skroejer (202-326-2459),
Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue NW,
Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(g) of the Federal Trade Commission Act, 15 U.S.C. 46(g), and FTC Rule 2.51, 16 CFR § 2.51, notice is hereby given that the above-captioned petition has been filed with the Secretary of the Commission and is being placed on the public record for a period of thirty (30) days. After the period for public comments has expired and no later than one hundred and twenty (120) days after the date of the filing of the request, the Commission shall determine whether to reopen the proceeding and modify the Order as requested. In making its determination, the Commission will consider, among other information, all timely and responsive comments submitted in connection with this notice.

The full text of petition is provided below. An electronic copy of the full text of the petition and the exhibits attached to it can be obtained from the FTC Website at this web address: <https://www.ftc.gov/enforcement/cases-proceedings/191-0068/dte-energy-company-matter>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write “DTE Petition to Reopen and Modify; Docket No. C-4691” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *www.regulations.gov* website.

Due to protective actions in response to the COVID-19 pandemic and the agency’s heightened security screening, postal mail addressed to the Commission will be

subject to delay. We strongly encourage you to submit your comments online through the www.regulations.gov website.

If you prefer to file your comment on paper, write “DTE Petition to Reopen and Modify; Docket No. C-4691” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at www.regulations.gov, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with

FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on *www.regulations.gov* – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at <http://www.ftc.gov> to read this document and the news release describing this matter. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Authority: 15 U.S.C. 46, 5 U.S.C. 552.

April J. Tabor,

Secretary.

**Text of Petition of Respondent DTE Energy Company to Reopen
and Modify Decision and Order**

Pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 2.51, Respondent DTE Energy Company ("DTE") respectfully requests that the Commission reopen and modify the Commission's Decision and Order entered on November 21, 2019,

in Docket No. C-4691 (the "Order") (attached as Exhibit 1). Specifically, because DTE has exited the relevant market addressed by the Order and because DTE's successor remains under the Order, DTE seeks to vacate the Order as it applies to DTE or otherwise to relieve DTE of any continuing obligations under the Order.

The Commission entered the Order to address the alleged anticompetitive effect from the acquisition of Generation Pipeline LLC ("Generation") by NEXUS Gas Transmission, LLC ("NEXUS"), at the time, a 50/50 joint venture between DTE and Enbridge Inc. Under the Order, Respondents NEXUS, DTE, and Enbridge were required, among other things, to remove a non- compete provision in the Purchase and Sale Agreement governing NEXUS's acquisition of Generation. At all times since the entry of the Order, DTE has complied with the Order in all respects.

In November 2020, DTE notified the Commission that it intended to spin off its DTE Midstream business, which included DTE's non-utility natural gas pipeline, storage, and gathering business, to a separate corporate entity now known as DT Midstream, Inc. (the "Spin-off"). The Spin-off was completed on July 1, 2021. As a result, DTE no longer holds, directly or indirectly, an interest in NEXUS, Generation, or any other natural gas pipeline, storage, or gathering assets or business in the Relevant Area.¹ DT Midstream has succeeded to DTE's obligations under the Order, while NEXUS and Enbridge remain Respondents under the Order. Those three entities are the appropriate Respondents under the Order.

In light of these changed conditions of fact, DTE hereby petitions the Commission to reopen and modify the Order to relieve DTE of all continuing obligations under the Order. Such relief is in the public interest.

I. Background

¹ Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Order.

A. Initial Transaction

The acquisition of Generation by NEXUS was subject to review under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"). In the course of the HSR Act review, Commission staff raised concerns regarding the non-compete provision in the Purchase and Sale Agreement, which would have prevented North Coast Gas Transmission LLC, the previous owner of Generation, from competing to provide natural gas transportation within a restricted area encompassing parts of Lucas, Ottawa, and Wood counties in Ohio for a period of three years. As a means of resolving such concerns, DTE and the other Respondents executed an agreement containing the Order in August 2019. On September 13, 2019, the Commission accepted the agreement containing the Order and published it for public comment.

B. The Order

On November 21, 2019, the Commission, pursuant to procedures described in Section 2.34 of its Rules, 16 C.F.R. § 2.34, entered the Order. To address the concern that the non-compete provision would result in harm to competition in the natural gas pipeline transportation market in the Relevant Area (i.e. Lucas, Ottawa, and Wood counties in northwest Ohio), Paragraph II.A of the Order required the removal of the non-compete provision from the Purchase and Sale Agreement. On September 13, 2019, prior to the closing of the Generation acquisition, DTE and the other parties to the transaction amended the Purchase and Sale Agreement to eliminate the non-compete provision.

Other provisions of the Order impose certain prior approval, notification, and reporting requirements on DTE and the other Respondents, including the requirement to obtain prior Commission approval before entering certain agreements restricting competition for natural gas pipeline transportation in the Relevant Area (§ II.B), to provide prior notice before acquiring an interest in any natural gas transportation pipeline

in the Relevant Area (§ III), to report annually on compliance (§ IV), and to notify the Commission regarding changes in any Respondent that may affect compliance (§ V).

C. DTE's Compliance with the Order

At all times since the entry of the Order, DTE has been in compliance with the Order. DTE filed its first annual compliance report in November 2020. In response, Commission staff issued a letter stating that no compliance action is necessary. In addition, DTE previously had filed several initial and interim compliance reports, including initial compliance reports on October 15, 2019 and November 13, 2019, each under Paragraph 7 of the agreement containing the Order, and an interim compliance report on December 20, 2019, under Paragraph IV.A.I of the Order.

D. DTE's Spin-off Transaction

First publicly announced in October 2020, the Spin-off provides benefits to both DTE and DT Midstream, as well as each company's employees and shareholders. *See* October 27, 2020 DTE Press Release (attached as Exhibit 2). Among other things, the Spin-off "[t]ransforms DTE [] into a high growth, predominately pure-play, regulated Michigan-based utility" and "[p]ositions [DT] Midstream as a premier independent, natural gas midstream company with assets in premium basins connected to major demand markets." *Id.* The Spin-off will "[e]nable[] each business to pursue separate and distinct strategies led by proven boards and management teams who have skillsets and experience directly linked to each company's unique strategic and financial objectives." *Id.*

The Spin-off was completed on July 1, 2021. On that day, DT Midstream, which formerly included DTE's non-utility natural gas pipeline, storage, and gathering business, became a publicly traded, standalone company. *See* July 1, 2021 DTE Press Release (attached as Exhibit 3). DT Midstream common stock trades on the New York Stock Exchange under the symbol DTM. Although DTE and DT Midstream have one common

board member, this complies with Clayton Act Section 8. Under the Spin-off, DTE's 50-percent ownership interest in NEXUS was transferred to DT Midstream. *See* Declaration of JoAnn Chavez of DTE Energy Co. (attached as Exhibit 4), at 4. In addition, DT Midstream has certified to the Commission that it has succeeded to DTE's obligations under the Order and will comply therewith. *See* Letter from Wendy Ellis of DT Midstream (attached as Exhibit 5).

The Spin-off thus leaves DTE with:

- (1) no interest (direct or indirect) in NEXUS;
- (2) no interest (direct or indirect) in Generation; and
- (3) no interest (direct or indirect) in any other natural gas pipeline, storage, or gathering assets or business in the Relevant Area.

DTE has no plans or present intention to acquire any direct or indirect interest in DT Midstream, NEXUS, or Generation, or otherwise to enter the market for natural gas pipeline transportation in the Relevant Area. *See* Declaration of JoAnn Chávez of DTE Energy Co., at ¶ 6.

II. Changed Conditions of Fact and the Public Interest Require Modification of the Order to Remove DTE as a Respondent

A. Changed Conditions of Fact

Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 2.51(b) of the Commission's Rules of Practice, 16 C.F.R. § 2.51(b), provide that the Commission may reopen and modify an order if the respondent makes a satisfactory showing that changed conditions of law or fact require the order to be altered, modified, or set aside, or that the public interest so requires. The Commission has stated that "[a] satisfactory showing sufficient to require reopening is made when a request identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition." *Eli Lilly & Co.*, Dkt.

No. C-3594, Order Reopening and Setting Aside Order, at 2 (May 13, 1999). Further, if the Commission determines that the respondent has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. *See Stop and Shop Cos., Inc.*, Dkt. No. C-3649, Order Reopening and Modifying Order, at 5 (June 20, 1997).

As the Commission has determined in numerous cases, the exit of a respondent from the relevant market eliminates the continuing need for the Order's remaining requirements to apply to that respondent and thus is a changed circumstance sufficient to support the setting aside of the Order as to the respondent. *See, e.g., AEA Investors 2006 Fund L.P.*, Dkt. No. C-4297, Order Reopening and Modifying Final Order (Apr. 30, 2013) (order set aside for respondent that no longer held interest in businesses covered by the order); *Duke Energy Corp.*, Dkt. No. C-3932, Order Reopening and Modifying Order (Sept. 26, 2007) (order set aside for respondent that had spun off midstream natural gas business covered by the order); *Koninklijke Ahold, NV.*, Dkt. No. C-4027, Order Reopening and Modifying Order (July 10, 2007) (order set aside for respondent that no longer operated supermarkets in relevant areas covered by the order) and Order Reopening and Modifying Order (July 21, 2006) (same); *Entergy Corp.*, Dkt. No. C-3998, Order Reopening and Setting Aside Order (July 1, 2005) (order set aside for respondent that had sold the business covered by the order); *Union Carbide Corp.*, 108 F.T.C. 184 (1986) (order set aside for respondent that had exited business covered by the order).

DTE's Spin-off of DT Midstream constitutes a changed condition of fact that justifies the Commission to modify the Order to relieve DTE of its obligations under the Order, because the Spin-off leaves DTE with no direct or indirect interest in any natural gas pipeline, storage, or gathering assets or business in the Relevant Area, which was not the case at the time the Commission issued the Order. This change eliminates the basis

for the Commission's concern with respect to DTE's presence in natural gas pipeline transportation in the Relevant Area.

In particular, the Order provision requiring prior notice of any DTE acquisition of an interest in a natural gas transportation pipeline in the Relevant Area is no longer necessary. DTE no longer has an ownership interest in either NEXUS or DT Midstream. As a result, DTE no longer competes to provide natural gas transportation in the Relevant Area. If DTE were to enter that market, such entry by DTE would introduce new competition. Rather than create a need for coverage under the Order, such entry would be procompetitive. In contrast, DT Midstream, which does compete to provide natural gas transportation in the Relevant Area, will continue to be subject to the Order, including this prior notice provision.

Similarly, the Order provision requiring DTE to obtain prior Commission approval before entering agreements concerning natural gas pipeline transportation in the Relevant Area is no longer necessary. The purpose of that provision is to provide the Commission with an opportunity to review any potentially anticompetitive agreements "between one or more Respondents and a Pipeline Competitor to provide natural gas transportation in the Relevant Area." Order II.B. As a result of the Spin-off, DTE no longer provides natural gas transportation in the Relevant Area. Because DTE is no longer in a horizontal competitive relationship with any Pipeline Competitor in the Relevant Area, there is no longer a need for the Commission to review any agreement DTE may seek to enter with such a firm. In contrast, DT Midstream, which does provide natural gas transportation in the Relevant Area, will continue to be subject to the Order, including this prior approval provision.

Consistent with longstanding FTC precedent, changed conditions of fact warrant the removal of DTE from the Order.

B. Public Interest

Because changed circumstances warrant reopening and modification here, the Commission need not consider whether removing DTE from the Order would serve the public interest. *See, e.g., Duke Energy Corp.*, Order Reopening and Modifying Order, at 3 ("In this instance, however, we do not need to assess the sufficiency of Petitioners' public interest showing because Petitioners have made the requisite satisfactory showing that changed conditions of fact require the Order to be reopened and set aside as to Duke Energy."); *Entergy Corp.*, Order Reopening and Setting Aside Order, at 3 (same). However, should the Commission deem it necessary to assess the public interest in setting aside the Order as to DTE, such modification would serve the public interest.

DTE meets the public interest requirement of Section 2.51(b) because, among other reasons, "the order in whole or part is no longer needed." Requests to Reopen, 65 Fed. Reg. 50,636, 50,637 (Aug. 21, 2000) (amending 16 C.F.R. § 2.51(b)). As a result of the Spin-off, DTE no longer has any natural gas pipeline transportation assets or business in the Relevant Area. Requiring DTE's continued compliance with the Order's prior approval, notice, and reporting provisions therefore contributes nothing to the Commission's interest in protecting competition and is not needed to protect the public interest.

Further, setting aside the Order as to DTE would eliminate unnecessary costs and burdens to DTE and the Commission during the remainder of the term of the Order - another eight years (through November 21, 2029). At the same time, because DT Midstream has certified to the Commission that it has succeeded to DTE's obligations under the Order and will comply with it, removing DTE from the Order would be the "more effective or efficient way of achieving the purposes of the Order." *Id.* Therefore, the public interest requires the setting aside of the Order as to DTE.

III. Conclusion

For these reasons, Respondent DTE respectfully requests that the Commission

reopen and vacate the Order as it applies to DTE, or to otherwise modify the Order to relieve DTE of any continuing obligations thereunder. Such a modification is justified by changed conditions of fact, and is consistent with the public interest and the underlying purposes of the Order. The attached Declaration and other accompanying exhibits set forth and support the specific facts described herein and demonstrate why the requested modification of the Order is appropriate.

Dated: September 21, 2021

Respectfully submitted,

s/ Mike Cowie

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